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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

HOZIE CHAMBERLIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a brief detention of an individual reasonably suspected of criminal activity in order to search for his escaped companion and to investigate those suspicions at a nearby store is unlawful in the absence of probable cause to arrest.

2. Whether, assuming that the detention of respondent in this case violated the Fourth Amendment, statements by store employees who knew respondent that he had attempted to negotiate a stolen check must be suppressed as a fruit of that detention.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–16a) is not yet reported. The earlier opinion of the court of appeals (App. C, *infra*, 19a–33a), since withdrawn, is reported at 609 F.2d 1318.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 17a) was entered on October 7, 1980. On November 26, 1980, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 2, 1981 (App. D, *infra*, 34a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a non-jury trial on stipulated facts in the United States District Court for the Southern District of California, respondent was convicted of possession of a check stolen from the mail, in violation of 18 U.S.C. 1708. He was sentenced to a term of nine months' imprisonment.

The evidence at a pretrial suppression hearing showed that on the afternoon of October 4, 1978, Officer Morse of the San Diego Police Department, while driving on routine patrol, observed respondent and Robert Franklin walking away from the Chicano Park area of San Diego (App. A, *infra*, 2a). Officer Morse recognized them as individuals with extensive criminal records for narcotics violations, receiving stolen prop-

erty, forgery and burglary. When Officer Morse drove past them he noticed that respondent and Franklin looked worried and quickened their pace (*ibid.*). A few minutes later, Officer Morse again spotted respondent and Franklin a few blocks from where they had first been seen; at that time he saw that Franklin had left the sidewalk to walk between two houses (Tr. 12–13).[1] When respondent and Franklin noticed the patrol car, they attempted to flee (Tr. 14).

Officer Morse was able to catch up with respondent, whose physical handicap prevented him from escaping. Morse asked respondent what he was doing, and he replied that he was returning from paying his mother's bill at the Universal Furniture Store. Morse then asked why "Robert" had run away, and respondent replied, "I don't know any Robert." Officer Morse knew, however, that respondent and Robert Franklin were well acquainted (App. A, *infra*, 2a).

At this point, Morse told respondent to get into the patrol car, after which Morse set out to search for Franklin. After about five minutes had passed, Morse received a radio call informing him that a government check made out to "Willie Johnson" had been found on the ground near the point where respondent had attempted to flee. When Morse brought the check to the patrol car, respondent became visibly nervous. Morse then inquired again about respondent's earlier explanation that he had been paying a bill at the Universal Furniture Store, and respondent denied having made such a statement (App. A, *infra*, 3a)

Officer Morse then drove to the Universal Furniture Store. The manager and two employees stated that they knew respondent and that he had been in the

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[1] "Tr." refers to the combined transcript of the suppression hearing and trial.

store an hour earlier attempting to negotiate a check. They identified the check made out to Willie Johnson as the check respondent had attempted to cash. At this point, approximately 20 minutes after respondent was first detained, Officer Morse placed him under arrest (App. A, *infra*, 3a–4a).

The district court denied the motion to suppress (Tr. 96–102). Relying in large part on *United States* v. *Pope*, 561 F.2d 663 (6th Cir. 1977), the court held that Officer Morse had a sufficient basis for suspicion to detain respondent, primarily premised upon his knowledge of respondent's criminal record, his observation of respondent's suspicious behavior, and the fact that respondent attempted to flee when he saw the officer (Tr. 97–100). After respondent denied knowing anyone named Robert, when Officer Morse knew that in fact respondent did know Franklin, the court held that Morse acted reasonably in not releasing respondent. The court stated (Tr. 101): "[F]aced with the alternative of ascertaining the whereabouts of Robert then, the only thing he could reasonably do, since he had to be mobile to ascertain Robert's whereabouts, is take the defendant with him in the car." Finally, the court concluded that the information obtained at the furniture store clearly established probable cause to arrest.

2. The court of appeals reversed in an opinion issued December 26, 1979 (App. C, *infra*, 19a–33a). The government filed a petition for rehearing. On October 7, 1980, the court of appeals withdrew its prior opinion and entered an amended opinion again reversing the district court (App. A, *infra*, 1a–16a).

The court of appeals agreed with the district court that Officer Morse was justified in making an investigatory stop of respondent (App. A, *infra*, 4a–5a). The court also found that there was "no doubt" that Morse's detention of respondent while he searched for

Franklin and investigated the check constituted "reasonable, good faith police work on the part of the officer" (*id.* at 8a). Nonetheless, the court concluded that this detention in the absence of probable cause violated *Dunaway* v. *New York*, 442 U.S. 200 (1979). The court noted that investigative stops based on reasonable suspicion had been authorized in the case of "a limited on-the-street stop and frisk for weapons" or a roving border patrol stop of "less than a minute [involving] only a brief question or two" (App. A, *infra*, 7a). The court of appeals explained, however, that *Dunaway* established that "for all but these narrowly defined intrusions," probable cause was necessary (*id.* at 8a). Thus, Officer Morse's reasonable suspicion that criminal activity was afoot was sufficient only "to justify a brief stop and a few brief questions" (*ibid.*), not the 20 minute detention involved here.[2] Because respondent was not free to go and was detained so that Officer Morse could "find out what was going on," the court concluded that the 20 minute detention was a " 'detention for custodial interrogation' " that required probable cause under *Dunaway* (*id.* at 9a).

Accordingly, the court of appeals held that certain evidence obtained after respondent was placed in the patrol car must be suppressed as the fruit of the illegal detention. The court noted that respondent's statements that he had paid a bill at the Universal Furniture Store and that he did not know Robert were made in the course of a lawful investigative stop before respondent was placed in the patrol car (App. A, *infra*, 10a–11a). However, after the check was discovered, Officer Morse observed respondent's nervousness and respondent disclaimed his earlier mention of the furni-

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[2]The court acknowledged that "[t]his case certainly constitutes a lesser intrusion" than that in *Dunaway*, but found that it was a greater intrusion than a *Terry* stop (App. A, *infra*, 9a).

ture store. The court held that this evidence must be suppressed—the observation of nervousness as a fruit of the illegal detention and the disclaimer because it was obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (App. A, *infra*, 11a–13a).[3] Reasoning that respondent's nervousness and his disclaimer of previous mention of the furniture store "added considerable impetus to the investigation, and tended significantly to direct the investigation to the furniture store," the court held that the identification of respondent must be excluded as the fruit of the unlawful detention (*id.* at 14a).

Judge Choy agreed that the detention after the initial investigatory stop violated *Dunaway*, but he dissented on the fruits question (App. A, *infra*, 15a–16a). Noting that the discovery of the check and the reference to the furniture store were both indisputably untainted, Judge Choy concluded that "[e]ven if [respondent] had been released before, the officer would have proceeded directly to the furniture store, where he would have obtained (without any hint of illegality) the evidence that was used to convict [respondent]" (*id.* at 15a). Thus, respondent's nervousness and his disclaimer were "not the source of the evidence obtained at the furniture store" (*id.* at 15a–16a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important constitutional question concerning the scope of police power to detain an individual reasonably suspected of criminal activity, for investigative purposes, in the absence of probable cause to arrest him. The court of appeals expressly acknowledged that Officer Morse had engaged in "rea-

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[3]The court did not discuss the possibility of a *Miranda* violation in its first opinion.

sonable, good faith police work" (App. A, *infra*, 8a). Nonetheless, it ruled that the officer's actions violated the Fourth Amendment because the detention exceeded rigid limitations on the permissible scope of investigative detentions established by *Dunaway* v. *New York*, 442 U.S. 200 (1979). However, the Fourth Amendment prohibits only "unreasonable" searches and seizures. Some seizures, as in *Dunaway*, constitute such a substantial invasion of personal liberty that they are unreasonable in the absence of probable cause. But, in our view, the court of appeals erred in holding that the detention here, which did not even begin to approach the intrusiveness of the seizure in *Dunaway*, violated the Fourth Amendment because it exceeded a "brief stop."

A case presenting the general issue of the permissible scope of an investigative detention is now pending before this Court. *Michigan* v. *Summers*, cert. granted, No. 79-1794 (Oct. 14, 1980). Our view of the proper framework for analysis of this issue is set out in our brief as amicus curiae in that case. Under that framework, we believe that the detention in this case was lawful.

Officer Morse acted reasonably at all times, as the court of appeals itself noted. He had grounds to suspect both respondent and Franklin of criminal activity. When, at first, he was able to apprehend only respondent, it would have been unreasonable for him to be forced to choose between releasing respondent without conducting his investigation and abandoning his pursuit of Franklin. Particularly after his suspicions were intensified when respondent denied knowing "Robert," it was reasonable for Officer Morse to detain respondent for a few minutes while he sought to locate Franklin. After respondent had been detained for five minutes, Officer Morse's suspicions were further intensified when the check payable to Willie

Johnson was discovered on the ground where respondent had been stopped. It was reasonable for the officer to take respondent on a short trip to the furniture store in order to confirm or refute the suspicions thus generated. See *United States* v. *Short*, 570 F.2d 1051, 1054–1055 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62, 70–71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978).

In our view, this case illustrates the necessity for application of a flexible standard of reasonableness to investigative detentions that do not rise to the level of intrusiveness of an arrest. Here, after Officer Morse already had reasonable suspicion sufficient to detain respondent, two independent events occurred—respondent's false reply and the discovery of the check—that intensified his suspicions. In this type of situation, which is not uncommon, a rule embodying rigid temporal and spatial limitations is inadequate to balance the legitimate needs of law enforcement against the Fourth Amendment protection from unreasonable seizures.

Because this Court's decision in *Michigan* v. *Summers*, *supra*, can be expected to provide guidance in assessing the correctness of the court of appeals' decision in this case, this petition should be held pending the disposition of that case.

2. A secondary issue presented by this case concerns the court of appeals' finding that the identification of respondent by employees of the furniture store was a fruit of the illegal detention. In our view, this finding stems from an erroneous application of established Fourth Amendment principles to the facts at hand. Evidence is to be suppressed only if it "is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). In this case, as Judge Choy explained in his dissent, the

illegal detention was not the source of the identification. Because this question is essentially fact-bound, we do not consider it independently worthy of review by this Court. We raise it here only in order to preserve the question should it become relevant to the Court's disposition of this case.

The court of appeals stated that respondent's apparent nervousness and his disclaimer of earlier mention of the furniture store "tended significantly to direct the investigation to the furniture store" (App. A, *infra*, 14a). But it appears clear that apart from these two pieces of information, which indisputably were fruits of the detention, respondent would still have been identified at the furniture store. Respondent's statement that he had paid his mother's bill at the furniture store was made prior to the allegedly illegal detention (*id.* at 13a). The officer's attention was already focused on the Universal Furniture Store, as evidenced by the fact that he specifically asked respondent about it. Respondent's reply and his nervousness, while they certainly did not dissuade Officer Morse from his decision to pursue his investigation at the furniture store, made no more than a *de minimis* contribution to that decision, and thus the identification was in no way a product of the alleged illegality. See, *e.g.*, *Durham* v. *United States*, 419 F.2d 392 (9th Cir. 1969), vacated on other grounds, 401 U.S. 481 (1971).[4]

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[4] In any event, the degree to which the nervousness and disclaimer contributed to Morse's decision to go to the furniture store is a factual question on which it was unnecessary for the district court to make a finding because it held that there was no illegality at all. Rather than resting its decision on the implicit factual conclusion that Morse would not have gone to the store to investigate but for the disclaimer and nervousness, the court of appeals should at most have remanded to the district court for further fact finding.

Similarly, the fact that respondent was in detention was not a cause of his identification by the store employees as the person who attempted to negotiate the stolen check. It was stipulated that the manager and a store employee were well acquainted with respondent (R. 28–29).[5] Thus, their knowledge that respondent had attempted to negotiate the check made out to Willie Johnson was unrelated to the detention. See *United States* v. *Crews*, *supra*, 445 U.S. at 472–473. Assuming that respondent had been released before the check was discovered, Officer Morse would nevertheless have gone to the store without respondent and would have inquired whether he had attempted to negotiate a check. The store employees would have informed Morse that respondent had attempted to negotiate the check made out to Johnson. Thus, respondent's presence was not a cause of the identification.[6]

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Michigan* v. *Summers*, *supra*,

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[5]"R." refers to the record on appeal.

[6]The court of appeals also held that respondent's disclaimer was suppressible as a *Miranda* violation. This objection to the admission of respondent's statement was not raised by him in the district court and should not have been considered by the court of appeals. See Fed. R. Crim. P. 12. In any event, the alleged *Miranda* violation is not grounds for reversing respondent's conviction if, as we contend, the detention was lawful. Respondent's disclaimer was not part of the evidence introduced at trial on which the conviction was based. The identification of respondent by the store employees was the crucial evidence, and, for the reasons stated above, that evidence was not a fruit of the disclaimer. Indeed, the court of appeals did not suggest that the identification was a fruit of a *Miranda* viola-

and should then be disposed of appropriately in light of that decision.

Respectfully submitted.

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JANUARY 1981

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tion, but emphasized that it should be suppressed as a fruit of the illegal detention (App. A, *infra*, 14a).

APPENDIX A

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 79-1076

D.C. No. CR-78-00740-01-E

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HOZIE CHAMBERLIN, DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Filed Oct. 7, 1980]

AMENDED OPINION

Before: CHOY, ANDERSON and HUG, *Circuit Judges.*

HUG, *Circuit Judge:*

The opinion of December 26, 1979 is hereby withdrawn and the following opinion is substituted. Hozie Chamberlin appeals from a conviction of possession of a check stolen from the mail in violation of 18 U.S.C. § 1708. The principal question on this appeal is whether the detention of the appellant following an investigatory stop resulted in a seizure amounting to an unlawful arrest, requiring suppression of the evidence derived from that detention. The appellant moved to suppress the evidence; and upon denial of the motion he waived a jury trial and proceeded to trial before the

court on stipulated facts. We find that the detention was unlawful and the motion to suppress should have been granted. We therefore reverse.

This issues involved are: (1) whether the investigatory stop of Chamberlin by the officer was justified by founded suspicion; (2) whether the subsequent detention amounted to unlawful arrest without probable cause; and (3) whether subsequent evidence obtained was the fruit of an unlawful arrest.

FACTS

On October 4, 1978 at about 12:20 P.M. Officer Morse of the San Diego Police Department, while driving on routine patrol, observed appellant, Hozie Chamberlin, and a companion, Robert Franklin, walking away from the Chicano Park area in southeast San Diego. Officer Morse recognized Chamberlin and Franklin as individuals with extensive criminal records for narcotics violations, receipt of stolen property, forgery and burglary. Officer Morse was suspicious that criminal activity was afoot because they looked worried as he passed and quickened their pace. He drove back by the area about a minute later. Robert Franklin then darted between two houses, looked back out between the houses at the officer and began running away. Appellant Chamberlin also attempted to flee but was hampered from running because of his physical handicap.

Officer Morse caught up with Chamberlin and asked him what he was doing. Chamberlin replied that he was returning from paying his mother's furniture bill at the Universal Furniture Store. Officer Morse then asked why Robert had run away. Chamberlin replied, "I don't know any Robert." This increased Officer Morse's suspicions because he knew that Chamberlin and Robert Franklin were well acquainted.

At this point, Officer Morse required appellant Chamberlin to get in the back of the patrol car so he could continue his search for Robert Franklin. It was Officer Morse's intention to detain Chamberlin for further investigation while he attempted to find Franklin.

Officer Morse proceeded to Franklin's residence and began working back towards the area from which Franklin and Chamberlin had fled. Five minutes after Chamberlin's detention began, Officer Morse received a radio call informing him that a check had been found lying near the point where Chamberlin and Franklin had been when they had begun to flee. He then went back to the area and obtained the check, which was a United States Treasury check bearing the name "Willie Johnson" as payee.

When Officer Morse returned to his patrol car with the check, Chamberlin became nervous and began to sweat. Officer Morse then reinquired as to Chamberlin's statement regarding paying his mother's furniture bill at the Universal Furniture Store. Chamberlin denied that he made any statement about having been at the Universal Furniture Store and explained that his mother lived on University Avenue and that this was possibly what the officer heard him say. At this point, Officer Morse decided to go to the Universal Furniture Store to investigate the matter further.

He drove to the store with Chamberlin still in the back of the patrol car. At the store the manager and the employees informed Officer Morse that they knew Hozie Chamberlin and that he had been in the store an hour earlier attempting to negotiate a check. Officer Morse showed them the check bearing the name "Willie Johnson" as payee and they identified it as the check Chamberlin had earlier tried to cash. Officer Morse then placed Chamberlin under arrest. Chamberlin had been detained in the rear of the patrol

car for twenty minutes from the time he was first picked up.

Chamberlin was indicted for possession of a check stolen from the mail. 18 U.S.C. § 1708. Chamberlin contended that the stop and arrest were unlawful and moved to suppress all statements and evidence obtained as a result of the stop and arrest. The motion was followed by a hearing at which Officer Morse and other witnesses testified. The district court noted that this was a close case and denied the motion, holding that the stop was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968). The district court relied largely upon the Sixth Circuit case of *United States v. Pope*, 561 F.2d 663 (6th Cir 1977), in which the flight of the accused upon the approach of an officer to question him was a major factor in the court's determination that reasonable suspicion for the *Terry* stop existed. The district court in the instant case did not focus upon the question of the lawfulness of the detention in the patrol car subsequent to the investigatory stop and prior to the interview with the employees of the furniture store. It should be noted that the district court did not then have the benefit of the Supreme Court's recent ruling in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979), which bears heavily upon this question.

DISCUSSION

We first examine the two possible intrusions into rights protected by the fourth and fourteenth amendments: the stop and the subsequent detention.

1. *The stop.* When Officer Morse first observed Chamberlin and Franklin, he knew that both men had criminal records. He also observed that when these two men noticed him, both men looked worried and quickened their pace. A minute later while watching the two men for the second time, Officer Morse ob-

served Franklin go between two houses, look toward him, and begin to run. Chamberlin also attempted to flee. As the trial judge correctly noted, the flight of both men is a crucial fact which justified the investigatory stop. Under all these circumstances, Officer Morse was justified in making an investigatory stop of Chamberlin under *Terry v. Ohio*, 392 U.S. 1 (1968).[1]

2. *The subsequent detention.* The detention in this case must be analyzed in light of the Supreme Court's recent decision of *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979). In *Dunaway*, Rochester police suspected that the defendant had killed the proprietor of a pizza parlor in Rochester, N.Y., but did not have probable cause to get a warrant for his arrest. The police officers took the defendant from a neighbor's house, seated him in a police car, transported him to the police headquarters, and placed him in an interrogation room. Although the defendant was not told he was under arrest, he would have been physically restrained if he had attempted to leave. After giving the defendant his *Miranda* warnings, the officers questioned the defendant. Defendant waived counsel and eventually made statements and drew sketches that incriminated him in the crime.

The issue before the Supreme Court was whether the Rochester police violated the fourth and fourteenth amendments when, without probable cause to arrest, they took the defendant into custody, transported him

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[1] California law governing brief investigatory stops is the same as the federal law. *See In Re Tony C.*, 21 Cal. 3d 888, 893-95, 582 P.2d 957, 959-61, 148 Cal. Rptr. 366, 368-70 (1978). The stop in this case was made by a state officer. We find that the investigatory stop was proper under both state and federal standards, and thus, need not reach the question which would be posed were the state standard more restrictive. *See United States v. Orozco*, 590 F.2d 798, 792 n.1 (9th Cir. 1979); *United States v. Grajeda*, 587 F.2d 1017 (9th Cir. 1978).

to the police station, and detained him there for interrogation. The Court stated:

> The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides: The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . . There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station.

Dunaway, 99 S.Ct., at 2253. The Court then noted: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Dunaway*, 99 S.Ct. at 2253 n.6, quoting from *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The Court in *Dunaway* carefully analyzed the distinction between the seizure of a person of arrest, which requires probable cause, and the more limited seizure of a person by a brief investigatory stop, which requires merely reasonable suspicion. The Court rejected the suggestion of a multifactor balancing test of "reasonable police conduct under the circumstances." It emphasized that the *Terry* stop was a narrow exception and was not to be extended so as to erode the long prevailing standards of probable cause. The Court stated:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to

> depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway, 99 S.Ct. at 2257.

The Court stressed that a lesser standard than probable cause was not to be applied merely because the seizure occurred during an investigative stage rather than an accusatory stage. In quoting from *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969) the Court stated:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"

Dunaway, 99 S.Ct. 2257.

The *Terry* case involved a limited on-the-street stop and frisk for weapons. The Court in *Dunaway* traced the narrow application of the exception in subsequent cases. The Court pointed out in *Dunaway*, 99 S.Ct. at 2256–57 that *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), applied the *Terry* exception to roving border patrols stopping automobiles to check for illegal immigrants where the stop was for less than a minute and involved only a brief question or two. However, as

the Court noted, *Brignoni-Ponce* refused to extend *Terry* to a generalized balancing test but had stated:

> "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" *Brignoni-Ponce*, at 881–882, Accord, *United States v. Martinez-Fuerte*, *supra*, 428 U.S., at 567, 96 S.Ct. at 3087.

Dunaway, 99 S.Ct. at 2256–57.

The Court in *Dunaway* emphasized that for all but these narrowly defined intrusions, the longer detentions must be justified by the traditional requirement of probable cause. Probable cause exists where facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Dunaway*, 99 S.Ct. at 2254 n.9.

As we have noted, there were sufficiently specific articulable facts upon which to base a reasonable suspicion that criminal activity was afoot when Chamberlin was stopped. This would be sufficient to justify a brief stop and a few brief questions. However, there was not probable cause then or after the brief questioning to justify a more extensive detention. Chamberlin was held in the back of the patrol car for twenty minutes while the police officer attempted to locate Robert Franklin and continue his investigation. There is no doubt that this was reasonable, good faith police work on the part of the officer. He was obviously attempting to retain custody of Chamberlin until he could locate Franklin to question them both. The government argues that this detention was jus-

tified by the necessities of the circumstances and the good faith actions of the police officer. This, however, is the very balancing approach that the Supreme Court rejected in *Dunaway*. It is true that the fact situtation in *Dunaway* constituted a more flagrant unlawful detention, because the police, without probable cause, went out to pick up the accused rather than encountering him in suspicious circumstances, and not only placed him in the patrol car, but took him to the police station. This case certainly constitutes a lesser intrusion on Chamberlin's liberty. However, this is a significantly greater intrusion than the brief *Terry* stop.

Here, Chamberlin was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes. While in the police car, Officer Morse observed his demeanor and questioned him. He was never informed that he was free to leave the car. In fact, Officer Morse admitted that once he detained Chamberlin, he was not free to go. Officer Morse also admitted that he detained Chamberlin "to find out what was going on." Therefore, we conclude that the twenty-minute detention of Chamberlin constituted a "detention for custodial interrogation" within the meaning of *Dunaway v. New York*, requiring probable cause for justification.[2] We accordingly hold that this detention violated Chamberlin's fourth and fourteenth amendment rights.[3]

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[2]The limits of the *Terry*-type exception, when a balancing approach may be used, is subject to delineation in future cases, *see United States v. Perez-Esparza*, 609 F.2d 1284, 1287 n.2 (9th Cir. 1980). We note that *Dunaway* emphasizes that the exception is a narrow one.

[3]Since we find the detention violative of the federal Constitution, we need not reach the propriety under state law of the detention. *See United States v. Thompson*, 597 F.2d 187, 190 n.6 (9th Cir. 1979).

The final question is whether the statements made by Chamberlin after he was ordered into the police car, the observations of Chamberlin at that time, and ultimately the identification of Chamberlin at the furniture store, were fruits of the unlawful seizure. In *Wong Sun v. United States*, the Supreme Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, *Evidence of Guilt*, 221 (1959).

Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

In order to determine whether the statements, the observations of Chamberlin and the ultimate identification are fruits of the illegal detention, a brief review of the facts is necessary. When Officer Morse initially stopped Chamberlin, he asked Chamberlin two questions. Officer Morse asked Chamberlin what he was doing; Chamberlin responded that he had just returned from paying his mother's furniture bill at the Universal Furniture Store. Officer Morse also asked why Robert had run away; Chamberlin responded that he did not know any Robert. Both statements were made prior to placing Chamberlin in the police car while Officer Morse was still engaging in a *Terry* investigatory stop.[4] The investigatory stop was justified

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[4] For purposes of this analysis we shall take the facts as found by the district judge at the suppression hearing. The district judge found that the initial statement by Chamberlin about the

under the circumstances; thus, neither of these statements was the product of illegal activity.

Five minutes after placing Chamberlin in the police car, Officer Morse received a radio message that a check had been found near the point of Chamberlin's apprehension. After retrieving the check, Officer Morse observed Chamberlin's nervous demeanor. Officer Morse then reinquired as to Chamberlin's statement regarding paying his mother's furniture bill at the Universal Furniture Store. Chamberlin responded by disclaiming that he had made such a statement. In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Supreme Court dealt with the question of whether statements given by the defendant while illegally detained in custody were fruits of the illegal detention, and thus to be supressed under the exclusionary rule. In *Dunaway*, the Court further interpreted the *Brown* holding as applied to statements and sketches given by defendant Dunaway while in custody after an unlawful arrest. The Court stated:

> *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment." Following *Wong Sun* the court eschewed any *per se* or "but for" rule, and identified the relevant inquiry as "whether Brown's statements were obtained by exploitation of the illegality of his arrest." *Brown's* focus on "the causal connection between the illegality and the confession" reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connec-

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furniture store was before he was placed in the patrol car. However, the stipulated facts presented at trial indicate that the initial statement by Chamberlin that he had just been to the furniture store was after he had been placed in the patrol car.

> tion between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Dunaway, 99 S.Ct. at 2259 (citations omitted).

The three factors identified in *Brown* pertain particularly to statements or evidence which have been acquired from the defendant himself to determine whether there has been a sufficient attenuation or break in the causal chain to justify the use of the evidence.[5] In this case, because we have determined that the detention of Chamberlin was unlawful, and the questioning of him after he was held in the police car was "custodial interrogation," it is clear that the statement made must be suppressed under the fifth amendment since no *Miranda* warnings were given. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), *United States v. Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978). Therefore, we need not consider whether the three *Brown* factors apply so as to preclude the use of Chamberlin's statement disclaiming his prior comment about the furniture store, because we do not get beyond the threshold

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[5] We discussed these factors in *United States v. Perez-Esparza*, 609 F.2d 1284, 1289 (9th Cir. 1980) stating:

> The Court in *Brown v. Illinois, supra*, announced three factors for courts to consider, beyond the threshold Fifth Amendment question of voluntariness, in determining whether a putative defendant's inculpatory statements subsequent to an illegal arrest must be excluded. These factors are: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . ." *Brown v. Illinois, supra*, 422 U.S. at 603–04, 95 S.Ct. 2254, 2262, *quoted in Dunaway v. New York, supra*, 99 S.Ct. at 2259.

fifth amendment question. *See Dunaway*, 99 S.Ct. at 2259; *United States v. Perez-Esparza*, 609 F.2d 1284, 1289 (9th Cir. 1980).

We next consider whether the police officer's observations of Chamberlin's nervous demeanor must be excluded as fruit of the illegal seizure. It is apparent that the opportunity to observe his demeanor was brought about only because of his illegal detention, and thus must be excluded as an exploitation of his illegal arrest. *Dunaway*, 99 S.Ct. at 2259.

Finally, we consider the evidence of the identification of Chamberlin and the check at the furniture store. It was only after Officer Morse observed Chamberlin's nervous demeanor and Chamberlin had made the disclaimer, that Officer Morse decided to go to the Universal Furniture Store. After arrival at the store, the employees identified the check as being the same check that Chamberlin had tried to cash earlier. The information available to Officer Morse which was obtained independent of the illegal detention can be summarized as follows: Officer Morse observed Chamberlin acting suspiciously. Chamberlin had attempted to flee while Officer Morse was observing him for a second time. Chamberlin stated that he had just come from paying his mother's bill at the Universal Furniture Store. A check was subsequently found near the location of Chamberlin's attempted flight. The information available to Officer Morse which was obtained as a direct result of the illegal detention can be summarized as follows: After the officer retrieved the check, Chamberlin became very excited, began to sweat and appeared very nervous. Chamberlin denied making any statements about having been at the Universal Furniture Store. We must determine under the *Wong Sun* test whether this evidence was obtained by "exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary

taint." *Wong Sun*, 371 U.S. at 488. The focus is on the causal connection between the illegality and the evidence; and, the burden of showing admissibility rests on the prosecution. *Dunaway*, 99 S.Ct. at 2259. In this circuit, we have stated the test to be whether the illegal activity tends to significantly direct the investigation to the evidence in question. *United States v. Cales*, 493 F.2d 1215 (9th Cir. 1974), *United States v. Bacall*, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971). There is no doubt that the observation of Chamberlin's excited condition and nervousness, together with his statement that he had not previously mentioned the furniture store, added considerable impetus to the investigation, and tended significantly to direct the investigation to the furniture store. Thus, we hold that the identification evidence must be excluded as fruit of the unlawful detention.

We conclude that Officer Morse's observation as to Chamberlin's nervous demeanor, Chamberlin's statement that he did not mention having been at the Universal Furniture Store, and the identification made by the Universal Furniture Store employees are fruits of the unlawful detention and should have been suppressed.

Reversed and remanded.

USA v. CHAMBERLIN, No. 79-1076

CHOY, *Circuit Judge*, concurring and dissenting:

Because of the Supreme Court's strongly-couched dicta in *Dunaway v. New York*, ___U.S.___ (1979), I agree with my colleagues that the detention of Chamberlin after the initial investigatory stop was illegal.

However, I respectfully dissent from my colleagues' conclusion that all the evidence derived by the officer after the placement of Chamberlin in the back seat of the police car was tainted by the illegal detention and therefore must be suppressed as the fruit of a poisonous tree.

My colleagues find that the officer's initial observation of Chamberlin's suspicious behavior, Chamberlin's first statement about the Universal Furniture Store, and his statement regarding Franklin were completely untainted. All this evidence was obtained before the illegal detention.

But I wish to point out that the officer's receipt of the radio message and his discovery that the check belonged to a third person, rather than to Chamberlin's mother, were also untainted, because they had no connection with the illegal detention. The information in the officer's possession at that moment made him suspicious of Chamberlin's earlier reference to the furniture store. Even if Chamberlin had been released before, the officer would have proceeded directly to the furniture store, where he would have obtained (without any hint of illegality) the evidence that was used to convict Chamberlin.

Since in fact the officer had Chamberlin in detention when the properly discovered facts pointed him toward the furniture store, he engaged him in further dialogue about the furniture store and observed his nervousness and sweating. This evidence was the fruit of the illegal detention; however, it was not the source

of the evidence obtained at the furniture store. The illegally-obtained evidence merely buttressed a determination, based on undeniably legal evidence, that the officer had already made.

When reviewing refusals to suppress evidence, we view the facts in the light most favorable to the Government's position. *E.g.*, *United States v. Sherman*, 430 F.2d 1402, 1404 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971). I believe that the facts that emerge under such a view compel a result different from that which my colleagues have reached. *See United States v. Brandon*, 467 F.2d 1008, 1010–11 (9th Cir. 1972).

I would affirm the conviction.

/s/ _____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 79-1076

DC CR 78-00740-01-E

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HOZIE CHAMBERLIN, DEFENDANT/APPELLANT.

APPEAL from the United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered October 7, 1980.

APPENDIX C

In the United States Court of Appeals
NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HOZIE CHAMBERLIN, DEFENDANT-APPELLANT.

No. 79-1076.

Dec. 26, 1979.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Before CHOY, ANDERSON and HUG, Circuit Judges.

HUG, Circuit Judge:

Hozie Chamberlin appeals from a conviction of possession of a check stolen from the mail in violation of 18 U.S.C. § 1708. The principal question on this appeal is whether the detention of the appellant following an investigatory stop resulted in a seizure amounting to an unlawful arrest requiring suppression of the evidence derived from that detention. The appellant moved to suppress the evidence and upon denial of the motion, he waived a jury trial and proceeded to trial before the court on stipulated facts. We find that the detention was unlawful and the motion to suppress should have been granted; we therefore reverse.

The issues involved are: (1) whether the investigatory stop of Chamberlin by the Officer was justified by

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founded suspicion; (2) whether the subsequent detention amounted to unlawful arrest without probable cause; and (3) whether subsequent evidence obtained was the fruit of an unlawful arrest.

FACTS

On October 4, 1978 at about 12:20 P.M. Officer Morse of the San Diego Police Department, while driving on routine patrol, observed appellant, Hozie Chamberlin, and a companion, Robert Franklin, walking away from the Chicano Park area in southeast San Diego. Officer Morse recognized Chamberlin and Franklin as individuals with extensive criminal records for narcotics violations, receipt of stolen property, forgery and burglary. Officer Morse was suspicious that criminal activity was afoot because they looked worried as he passed and quickened their pace. He drove back by the area about a minute later. Robert Franklin then darted between two houses, looked back out between the houses at the officer and began running away. Appellant Chamberlin also attempted to flee but was hampered from running because of a physical handicap.

Officer Morse caught up with Chamberlin and asked him what he was doing. Chamberlin replied that he was returning from paying his mother's furniture bill at the Universal Furniture Store. Officer Morse then asked why Robert had run away. Chamberlin replied, "I don't know any Robert." This increased Officer Morse's suspicions because he knew that Chamberlin and Robert Franklin were well acquainted.

At this point Officer Morse required appellant Chamberlin to get in the back of the patrol car so he could continue his search for Robert Franklin. It was Officer Morse's intention to detain Chamberlin for further investigation while he attempted to find Franklin.

Officer Morse proceeded to Franklin's residence and began working back towards the area from which Franklin and Chamberlin had fled. Five minutes after Chamberlin's detention began, Officer Morse received a radio call informing him that a check had been found laying near the point where Chamberlin and Franklin had been when they had begun to flee. He then went back to the area and obtained the check, which was a United States Treasury check bearing the name "Willie Johnson" as payee.

When Officer Morse returned to his patrol car with the check, Chamberlin became nervous and began to sweat. Officer Morse then reinquired as to Chamberlin's statement regarding paying his mother's furniture bill at the Universal Furniture Store. Chamberlin denied that he made any statement about having been at the Universal Furniture Store and explained that his mother lived on University Avenue and that this was possibly what the Officer heard him say. At this point, Officer Morse decided to go to the Universal Furniture Store to investigate the matter further.

He drove to the store with Chamberlin still in the back of the patrol car. At the store the manager and the employees informed Officer Morse that they knew Hozie Chamberlin and that he had been in the store an hour earlier attempting to negotiate a check. Officer Morse showed them the check bearing the name "Willie Johnson" as payee and they identified it as the check Chamberlin had earlier tried to cash. Officer Morse then placed Chamberlin under arrest. Chamberlin had been detained in the rear of the patrol car for twenty minutes from the time he was first picked up.

Chamberlin was indicted for possession of a check stolen from the mail. 18 U.S.C. § 1708. Chamberlin contended that the stop and arrest were unlawful and

moved to suppress all statements and evidence obtained as a result of the stop and arrest. The motion was followed by a hearing at which Officer Morse and other witnesses testified. The district court noted that this was a close case and denied the motion, holding that the stop was lawful under *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868. 20 L.Ed.2d 889 (1968). The district court relied largely upon the Sixth Circuit case of *United States* v. *Pope*, 561 F.2d 663 (6th Cir. 1977), in which the flight of the accused upon the approach of an Officer to question him was a major factor in the court's determination that reasonable suspicion for the *Terry* stop existed. The district court in the instant case did not focus upon the question of the lawfulness of the detention in the patrol car subsequent to the investigatory stop and prior to the interview with the employees of the furniture store. It should be noted that the district court did not then have the benefit of the Supreme Court's recent ruling in *Dunaway v. New York*, ___U.S.___, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), which bears heavily upon this question.

DISCUSSION

We first examine the two possible intrusions into rights protected by the Fourth and Fourteenth Amendments: the stop and the subsequent detention.

1. *The stop.* When Officer Morse first observed Chamberlin and Franklin, he knew that both men had criminal records. He also observed that when these two men noticed him, both men looked worried and quickened their pace. A minute later while watching the two men for the second time, Officer Morse observed Franklin go between two houses, look toward him, and begin to run. Chamberlin also attempted to flee. As the trial judge correctly noted, the flight of both men is a crucial fact which justified the inves-

tigatory stop. Under all these circumstances, Officer Morse was justified in making an investigatory stop of Chamberlin under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968).[1]

2. *The subsequent detention.* The detention in this case must be analyzed in light of the Supreme Court's recent decision of *Dunaway v. New York*, ___U.S.___, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, Rochester Police suspected that the defendant had killed the proprietor of a pizza parlor in Rochester, N.Y., but did not have probable cause to get a warrant for his arrest. The police officers took the defendant from a neighbor's house, seated him in a police car, transported him to the police headquarters, and placed him in an interrogation room. Although the defendant was not told he was under arrest, he would have been physically restrained if he had attempted to leave. After giving the defendant his *Miranda* warnings, the officers questioned the defendant. Defendant waived counsel and eventually made statements and drew sketches that incriminated him in the crime.

The issue before the Supreme Court was whether the Rochester Police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took the defendant into custody, trans-

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[1] California law governing brief investigatory stops is the same as the federal law. *See In Re Tony C.*, 21 Cal.3d 888, 893-95, 148 Cal. Rptr. 366, 368-70, 582 P.2d 957, 959-61 (1978). The stop in this case was made by a state officer. We find that the investigatory stop was proper under both state and federal standards and thus need not reach the question which would be posed were the state standard more restrictive. *See United States v. Orozco*, 590 F.2d 789, 792 n.1. (9th Cir. 1979); *United States v. Grajeda*, 587 F.2d 1017 (9th Cir. 1978).

ported him to the police station, and detained him there for interrogation. The Court stated:

> The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides: The right of the people to be secure in their persons . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . . There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station.

Dunaway, 99 S.Ct., at 2253. The Court then noted: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Dunaway*, 99 S.Ct. at 2253, n. 6, quoting from *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Court in *Dunaway* carefully analyzed the distinction between the seizure of a person for purposes of arrest, which requires probable cause, and the more limited seizure of a person by a brief investigatory stop, which requires merely reasonable suspicion, but normally consumes less than a minute or two and involves only a few brief questions. The Court rejected the suggestion of a multifactor balancing test of "reasonable police conduct under the circumstances." It emphasized that the *Terry* stop was a narrow exception and was not to be extended so as to erode the long prevailing standards of probable cause. The Court stated:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of

> these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway, 99 S.Ct. at 2257.

The Court stressed that a lesser standard than probable cause was not to be applied merely because the seizure occurred during an investigative stage rather than an accusatory stage. In quoting from *Davis v. Mississippi*, 594 U.S. 721, 726-27, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) the Court stated:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"

Dunaway, 99 S.Ct. 2257.

The *Terry* case involved a limited on-the-street stop and frisk for weapons. The Court in *Dunaway* traced the narrow application of the exception in subsequent cases. The Court pointed out in *Dunaway*, 99 S.Ct. at 2256-57 that *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1965), applied the *Terry* exception to roving border patrols stopping automobiles to check for illegal immigrants

where the stop was for less than a minute and involved only a brief question or two. However, as the Court noted, *Brignoni-Ponce* refused to extend *Terry* to a generalized balancing test but had stated:

> "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" *Brignoni-Ponce*, 422 U.S. at 881–882, 95 S.Ct. 2574. Accord, *United States v. Martinez-Fuerte, supra*, 428 U.S. 543, at 567, 96 S.Ct. 3074, at 3087, 49 L.Ed.2d 1116.

Dunaway, 99 S.Ct. at 2256–57.

The Court in *Dunaway* drew a firm line between the limited *Terry* stop, involving a very brief detention of a minute or so, and any more extensive detention. The longer detentions must be justified by the traditional requirement of probable cause. Probable cause exists where facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Dunaway*, 99 S.Ct. at 2254 n.9.

As we have noted, there were sufficiently specific articulable facts upon which to base a reasonable suspicion that criminal activity was afoot when Chamberlin was stopped. This would be sufficient to justify a brief stop and a few brief questions. However, there was not probable cause then or after the brief questioning to justify a more extensive detention. Chamberlin was held in the back of the patrol car for twenty minutes while the police officer attempted to locate Robert Franklin and continued his investigation. There is no doubt that this was reasonable, good faith

police work on the part of the officer. He was obviously attempting to retain custody of Chamberlin until he could locate Franklin to question them both. The government argues that this detention was justified by the necessities of the circumstances and the good faith actions of the police officer. This, however, is the very balancing approach that the Supreme Court rejected in *Dunaway*. It is true that the fact situation in *Dunaway* constituted a more flagrant unlawful detention because the police without probable cause went out to pick up the accused rather than encountering him in suspicious circumstances, and not only placed him in the patrol car but took him to the police station. This case certainly constitutes a lesser intrusion on Chamberlin's liberty. However, this is a significantly greater intrusion than the brief *Terry* stop and the opinion in *Dunaway* makes it very clear that a 'seizure' of a person for other than the very brief investigatory stop involved in *Terry* and *Brignoni-Ponce* must be justified by probable cause.

Here, Chamberlin was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes. While in the police car, Officer Morse observed his demeanor and questioned him. He was never informed that he was free to leave the car. In fact, Officer Morse admitted that once he detained Chamberlin, he was not free to go. Officer Morse also admitted that he detained Chamberlin "to find out what was going on." Therefore, we conclude that the twenty minute detention of Chamberlin constituted a "detention for custodial interrogation" within the meaning of *Dunaway v. New York*. We accordingly hold that this detention violated Chamberlin's Fourth and Fourteenth Amendment rights.[2]

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[2] Since we find the detention violative of the federal Constitution, we need not reach the propriety under state law of the

The final question before this court is whether the statements made by Chamberlin to Officer Morse which connected him to the Universal Furniture Store and resulted in his being connected to the check and the identification of him made by the Universal Furniture Store employees are fruits of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In *Wong Sun v. United States*, the Supreme Court stated that:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, *Evidence of Guilt*, 221 (1959).

Id. at 487–88, 83 S.Ct. at 417.

It is well-settled in this circuit that even if the controverted evidence could have been traced directly or indirectly from the leads turned up by the illegal activity, the evidence will nevertheless be admissible if in fact the Government learned of it from an independent source. *United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir.), *cert. denied* 404 U.S. 1004, 92 S.Ct. 565, 80 L.Ed.2d 557 (1971). *See also: United States v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974). Thus, the issue narrows to whether the primary illegality led to the discovery of the above noted statements and identification or whether it was obtained through independent means.

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detention. *See United States v. Thompson*, 597 F.2d 187, 190 n. 6 (9th Cir. 1979).

In order to determine whether the statements and identification are fruits of the poisonous tree, a brief review of the facts is necessary. When Officer Morse initially stopped Chamberlin, Officer Morse asked him two questions. Officer Morse asked Chamberlin what he was doing. Chamberlin responded that he had just returned from paying his mother's furniture bill at the Universal Furniture Store. Officer Morse also asked why Robert had run away. Chamberlin responded that he did not know any Robert. Neither of Chamberlin's statements was the product of illegal activity, and thus, the fruit of the poisonous tree doctrine is not applicable as to these statements. *See: United States v. Sand*, 541 F.2d 1370, 1375–76 (9th Cir. 1976), *cert. denied, sub nom. Scully v. United States*, 429 U.S. 1103, 97 S.Ct. 1130, 51 L.Ed.2d 553 (1977). Both statements were made prior to placing Chamberlin in the police car while Officer Morse was still engaging in a *Terry* investigatory stop.[3] As discussed above, the investigatory stop was justified under the circumstances.

Five minutes after placing Chamberlin in the police car, Officer Morse received a radio message that a check had been found near the point of Chamberlin's apprehension. After retrieving the check, Officer Morse observed Chamberlin's nervous demeanor. Officer Morse then reinquired as to Chamberlin's statement regarding paying his mother's furniture bill at the Universal Furniture Store. Chamberlin responded by disclaiming that he had made such a statement.

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[3] For purposes of this analysis we shall take the facts as found by the district judge at the suppression hearing. The district judge found that the initial statement by Chamberlin about the furniture store was before he was placed in the patrol car. However, the stipulated facts presented at trial indicate that the initial statement by Chamberlin that he had just been to the furniture store was after he had been placed in the patrol car.

Both Officer Morse's observation as to Chamberlin's nervous demeanor and Chamberlin's disclaimer are fruits of the poisonous tree. Both the observation and the disclaimer were products of the unlawful detention of Chamberlin. *See: United States v. Sand, supra* at 1375–76.

It was only after Officer Morse observed Chamberlin's nervous demeanor and Chamberlin had made the disclaimer that Officer Morse decided to go to the Universal Furniture Store. After arrival at the store, the employees identified the check as being the same check that Chamberlin had tried to cash earlier. Thus, whether the identification is fruit of the poisonous tree hinges on whether it was discovered as a result of the illegal detention or from sources independent of the illegal detention. The information available to Officer Morse which was obtained independent from the illegal detention can be summarized as follows: Officer Morse observed Chamberlin acting suspiciously. Chamberlin had attempted to flee while Officer Morse was observing him for a second time. Chamberlin stated that he had just come from paying his mother's bill at the Universal Furniture Store. A check was subsequently found near the location of Chamberlin's attempted flight. The information available to Officer Morse which was obtained as a direct result of the illegal detention can be summarized as follows: After retrieving the check, Chamberlin appeared nervous. Chamberlin also disclaimed that he had made the statement about having been at the Universal Furniture Store.

The test in this circuit is not whether a "but for" relationship exists between the illegal activity and later investigation but whether its fruits "tended to significantly direct" that investigation to the evidence in question. *United States v. Cales*, 493 F.2d 1215, 1215–16 (9th Cir. 1974); *United States v. Brandon*, 467

F.2d 1008, 1010 (9th Cir. 1972); *United States v. Bacall*, 443 F.2d 1050, 1057 (9th Cir. 1971). Here, the fruits of the illegal activity were Officer Morse's observation and Chamberlin's disclaimer. These fruits obviously "tended to significantly direct" Officer Morse to the Universal Furniture Store where the identification evidence was obtained. Thus, the identification evidence is fruit of the poisonous tree. We conclude that Officer Morse's observation as to Chamberlin's nervous demeanor, Chamberlin's disclaimer that he did not make the statement about having been at the Universal Furniture Store, and the identification made by the Universal Furniture Store employees are fruits of the poisonous tree and should have been suppressed.

Reversed and remanded.

CHOY, *Circuit Judge*, concurring and dissenting:

Because of the Supreme Court's strongly-couched dicta in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), I agree with my colleagues that the detention of Chamberlin after the initial investigatory stop was illegal.

However, I respectfully dissent from my colleagues' conclusion that all the evidence derived by the officer after the placement of Chamberlin in the back seat of the police car was tainted by the illegal detention and therefore must be suppressed as the fruit of a poisonous tree.

My colleagues find that the officer's initial observation of Chamberlin's suspicious behavior, Chamberlin's first statement about the Universal Furniture Store, and his statement regarding Franklin were completely untainted. All this evidence was obtained before the illegal detention.

But I wish to point out that the officer's receipt of the radio message and his discovery that the check belonged to a third person, rather than to Chamberlin's mother, were also untainted, because they had no connection with the illegal detention. The information in the officer's possession at that moment made him suspicious of Chamberlin's earlier reference to the furniture store. Even if Chamberlin had been released before, the officer would have proceeded directly to the furniture store, where he would have obtained (without any hint of illegality) the evidence that was used to convict Chamberlin.

Since in fact the officer had Chamberlin in detention when the properly discovered facts pointed him toward the furniture store, he engaged him in further dialogue about the furniture store and observed his nervousness and sweating. The evidence was the fruit of the illegal detention; however, it was not the source

of the evidence obtained at the furniture store. The illegally obtained evidence merely buttressed a determination, based on undeniably legal evidence, that the officer had already made.

When reviewing refusals to suppress evidence, we view the facts in the light most favorable to the Government's position. *E.g., United States v. Sherman.* 430 F.2d 1402, 1404 (9th Cir. 1970), *cert. denied,* 401 U.S. 908, 91 S.Ct. 866, 27 L.Ed.2d 805 (1971). I believe that the facts that emerge under such a view compel a result different from that which my colleagues have reached. See *United States v. Brandon,* 467 F.2d 1008, 1010–11 (9th Cir. 1972).

I would affirm the conviction.

APPENDIX D

Supreme Court of the United States

No. A-465

UNITED STATES, PETITIONER,

v.

HOZIE CHAMBERLIN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1981.

/s/ _____
WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 26th day of November, 1980.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1112

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

HOZIE CHAMBERLIN,

RESPONDENT.

MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 46 of this Court, the Respondent, Hozie Chamberlin, asks leave to file the Memorandum in Opposition to the Petition for Writ of Certiorari filed by Petitioner without prepayment of fees or costs and to proceed in forma pauperis. Respondent was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

DATED: 3 February 1981.

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SUPREME COURT, U.S.

No. 80-1112

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

HOZIE CHAMBERLIN,

RESPONDENT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1112

UNITED STATES OF AMERICA,

PETITIONER

- vs -

HOZIE CHAMBERLIN,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Government contends that an officer engaged in "reasonable, good faith police work" should be permitted to detain a person for twenty to thirty minutes even in the absence of facts rising to the level of probable cause and that all evidence obtained during that investigative detention should be admissible.

Respondent was convicted upon stipulations providing, inter alia:

"(5) That Terry B. Morse, San Diego Police Officer is called as a witness for the government and being first duly sworn testifies as follows:

> 'On October 4, 1978, at approximately 12:30 p.m., Robert Franklin ran and defendant Hozie Chamberlin, who has a physical handicap quickened his pace as I approached in my police vehicle. I apprehended Hozie Chamberlin and detained him in the police car as I attempted to locate Robert Franklin. While detained in the police car, Hozie Chamberlin stated that he had just been to the Universal Furniture Store. Shortly, thereafter

> I recovered United States Treasury check #11,728,876,... from William Mitchell. The check had been found near the spot where I had earlier apprehended Hozie Chamberlin. After I recovered the check, Hozie Chamberlin denied he had been to the Universal Furniture Store earlier that day. I went to the Universal Furniture Store and interviewed the manager and two employees. I then arrested Hozie Chamberlin and transported him to the San Diego Police Department.' (emphasis supplied)
>
> "(7) That the above stipulations would not have been entered into had the defendant's motion to suppress evidence been granted, and the defendant reserves his objection to the stop, search and seizure motion for appellate purposes." [C.R. 30]

The Government informs this Court that respondent answered the question of Officer Morse and provided the "returning from paying his mother's bill at the Universal Furniture Store" prior to the placing of respondent in the police vehicle. [Petition at p.2] Officer Morse did provide that testimony at the suppression proceedings. [Tr. 43-45] However, the Government stipulated that Officer Morse would testify at the trial:

> "While detained in the police car, Hozie Chamberlin stated that he had just been to the Universal Furniture Store." [C.R. 30]

Apparently, the Government discussed the matter with Officer Morse and refreshed his memory somewhat prior to entering into the stipulation that the initial statement pointing to the Universal Furniture Store had occurred while respondent was detained in the police car. Such further discussion with Officer Morse would be warranted where Officer Morse had been unable to recall at the motion proceedings whether he had seen respondent with Robert Franklin on "many occasions", "some occasions", "not many", or "some". [Tr. 45] As to advising respondent of his rights, Officer Morse testified, "I don't know whether I advised him of his rights at all." [Tr. 35]

Petitioner, believing that this Court will carve out an exception in Michigan v. Summers, No. 79-1794, to permit law enforcement officers to detain citizens for minutes, hours, or even days under the guise of investigative detentions in which the officers might be engaged in "reasonable, good faith police work", requests that this petition be held pending disposition in Michigan v. Summers, supra.

In Davis v. Mississippi, 394 U.S. 721, 726-727 (1969), this Court rejected "investigatory detentions" not based upon probable cause, stating:

> "[T]o argue that the Fourth Amendment does not apply to the investigative state is fundamentally to misconceive the purposes of the Fourth Amendment.... Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed arrests or investigatory detentions." 394 U.S. at 726-727.

Respondent was placed in a caged San Diego Police vehicle and detained for twenty to thirty minutes. Officer Morse testified that from the moment of the detention to the transportation of him to the San Diego Police Department respondent was not free to depart. [Tr. 76] That Officer Morse acted in "good faith" in detaining respondent was insufficient. Henry v. United States, 361 U.S. 98, 102 (1959). The seizure of respondent was required to be supported by the long prevailing standards of probable cause. Dunaway v. New York, 442 U.S. 200, 212 (1979).

Petitioner relies upon Michigan v. Summers, supra, pending in this Court, in requesting that the instant case be held in abeyance. However, in Michigan v. Summers, the officers were in the process of executing a search warrant. Those officers may be deemed to have acted pursuant to facts providing probable cause; whereas, petitioner does not contend that Officer Morse acted upon facts rising to the level of probable cause in detaining respondent.

Petitioner contends also that Officer Morse's trip to the Universal Furniture Store with the subsequent identification of respondent was not tainted by the illegal detention. This contention disregards the stipulation upon which respondent was convicted. The Government stipulated that Officer Morse would testify that respondent made the statement about the Universal Furniture Store while detained in the police vehicle. [C.R. 30] After the check was found and turned over to Officer Morse, respondent is alleged to have denied having made the prior Universal Furniture Store statement.

It was the statements of respondent set forth in the stipulations that led Officer Morse to the Universal Furniture Store and the identification of respondent. Those statements, the product of the illegal detention, and the subsequent identification were not so attentuated as to dissipate the taint of the illegal detention. See, Wong Sun v. United States, 371 U.S. 471, 488 (1963). Consequently, there was no intervening circumstances between the illegal detention

which produced the Universal Furniture Store statements and the subsequent identification of respondent by employees of that store.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: 30 January 1981.

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